



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :

- against - : FINAL

Police Officer Jon Goldin : ORDER

Tax Registry No. 899289 : OF

Aviation Unit : DISMISSAL
-----X

Police Officer Jon Goldin, Tax Registry No. 899289, Shield No. 10218, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 82337/06 as set forth on form P.D. 468-121, dated October 13, 2006, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Jon Goldin from the Police Service of the City of New York.


RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE: 0001 Hrs., April 7, 2008



POLICE DEPARTMENT

March 4, 2008

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In the Matter of the Charges and Specifications : Case No. 82337/06
- against - :
Police Officer Jon Goldin :
Tax Registry No. 899289 :
Aviation Unit :
-----X

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Robert W. Vinal
Assistant Deputy Commissioner - Trials

APPEARANCE:

For the Department: Lisa Bland, Esq.
Debbie Coleman, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Paul A. Goldberger, Esq.
401 Broadway
New York, NY 10013

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before me on September 11, October 18, October 22, and October 29, 2007, charged with the following:

1. Said Police Officer Jon Goldin, assigned to Aviation Unit, on or about and between June 26, 2006 through September 26, 2006, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Police Officer did wrongfully ingest cocaine without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

2. Said Police Officer Jon Goldin, assigned to Aviation Unit, on or about and between June 26, 2006 through September 26, 2006, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Police Officer did wrongfully possess cocaine without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges and a stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty as charged.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Police Officer Sayedul Rahman, Sergeant Caroline Rowe and Dr. Thomas Cairns as witnesses.

Police Officer Sayedul Rahman

Police Officer Rahman, testified that he is a licensed practical nurse assigned to the Medical Division's Drug Screening Unit. He collects hair samples from members who have been ordered to report to the Medical Division for random drug screening. He has received training regarding how to properly collect and seal hair samples for drug testing. He estimated that during each of his tours, he collects hair samples from ten to 15 members of the service. He collects three hair samples from each member.

Officer Rahman, testified that he remembered collecting hair samples from the Respondent on September 26, 2006, because they had engaged in an informal conversation regarding their mutual interest in aviation mechanics. After the Respondent appeared at the Medical Division's Drug Screening Unit and signed in, Rahman, following the mandated hair sample collection documentation procedures, assigned the Respondent drug screening number 35-3186-06-XH. At 1750 hours, this number was entered along with the Respondent's name, shield number, tax number and social security number on a "Drug Screening Questionnaire – Hair Testing" form [Department's Exhibit (DX) 1](Item "1." on this form reads: "List any prescription medication taken during the past 3 months." The Respondent wrote "Cholesterol meds 2 types." The Respondent signed and dated the form and Rahman signed it as the "collector." The Respondent's right index finger was inked and his fingerprint was entered on this form].

The Respondent's drug screening number was also entered on two "Specimen Drug Screening Custody and Control" forms. These identical forms contained pre-printed "Specimen ID" numbers. On one form the Specimen ID number was [REDACTED] (DX 2), and on the other form the Specimen ID number was [REDACTED] (DX 3). The

Respondent signed and dated each of the forms under the "Donor Certification" statement and Rahman signed both forms as the "collector."

Rahman then proceeded to follow the mandated hair sample collection procedures by cleaning the sample collection table with alcohol to sterilize it and by putting clean paper on top of the table. He then used sample collection packaging materials provided by Psychemedics Corporation (Psychemedics), the drug testing laboratory the Department utilizes for hair sample testing. He set-up on the table three strips of tin foil and three collection envelopes and three sample labels all of which he removed from a standard sealed kit provided by Psychemedics. Rahman put on sterile plastic gloves and removed a scissor from a sealed package provided by Psychemedics. Rahman testified that he asked the Respondent where on his body he wanted the hair to be removed. The Respondent told him to take it from his arm. Rahman testified that he removed hair from the Respondent's forearm and separated the hair into three piles. Each pile was placed into one of the three strips of tin foil and each strip of tin foil pile was placed into one of the three sample collection envelopes which were each sealed along with a Sample Acquisition Card denoting the Specimen ID number which Rahman had the Respondent initial (DX 4). The samples were then locked inside a locker. Two of the samples were mailed to Psychemedics and the third sample was retained for the Respondent's use.

On cross-examination, Rahman was asked whether he was supposed to note the Respondent's physical and mental condition. He answered in the negative.

Sergeant Caroline Rowe

Sergeant Rowe, an eight-year member of the service, who is assigned to Internal Affairs Bureau Group No. 34, testified that on October 10, 2006, she was informed that the Respondent had failed a Dole test by testing positive for cocaine. She recalled that she was assigned to participate in the suspension of the Respondent. She recalled that at 2300 hours, after the Respondent's tour ended that day, she was involved in a car stop of the Respondent's vehicle. She was present when the Respondent was suspended. She recalled that when she was leaving the Respondent's home in [REDACTED], she saw a female walking towards the Respondent. She described this female as very slender and "sickly looking." Rowe testified that she later learned that this female was the Respondent's girlfriend.

Rowe recalled that on December 21, 2006, her commanding officer handed her a newspaper article about the Respondent. She recalled that the Respondent was quoted in this article as asserting that he had tested positive for cocaine as a result of sexual contact with his girlfriend. Rowe testified that the Respondent never reported to IAB that the reason he had tested positive was because of his girlfriend. Rowe testified that the Respondent raised this for the first time at his official Department interview which was conducted on January 10, 2007.

On cross-examination, Rowe recalled that when the Respondent was first told that he was being suspended because he had tested positive for cocaine, the Respondent had expressed disbelief and that he made a statement to the effect that he could not have been more surprised if he had been told he was pregnant. Rowe confirmed that when she was inside the Respondent's residence she observed that it was well-kept and she observed

police badges mounted on the wall of his residence. Rowe testified that when she looked into the refrigerator inside the Respondent's residence, she observed that there was no alcohol in the refrigerator. Rowe identified photographs as representing what she had seen inside the Respondent's residence that day [Respondent's Exhibit (RX) A]. Rowe testified that as part of the investigation involving the Respondent, she reviewed the Respondent's telephone records, his sick leave record, his emergency day logs, and his performance evaluations. She testified that she uncovered nothing in these records that indicated that the Respondent had purchased, possessed, or used cocaine. She testified that she also reviewed the tape recorded interview of the Respondent's girlfriend, Coreen McCarthy. She testified that McCarthy stated at this interview that the Respondent would have kicked her out of his residence if he had known that she was using cocaine.

Dr. Thomas Cairns

Dr. Cairns, the Scientific Director for the Psychomedics Corporation (Psychomedics), a drug testing laboratory, was stipulated to be an expert in the area of testing hair for drugs based on the qualifications cited in his curriculum vitae (DX 6). Cairns explained that when cocaine is ingested, it enters the blood stream and as blood enters strands of hair, it carries some of the ingested cocaine with it. Since hair grows at a predictable rate, hair acts as a "time recorder" as to when the cocaine was ingested.

Cairns interpreted the data contained in the laboratory data package produced by Psychomedics which details the analytical results of the testing of the Respondent's hair samples (DX 7). He testified that the analytical results show that only one of the Respondent's two samples was initially tested and it screened positive for cocaine when

subjected to the EMIT screening test. As a result, following lab protocol, both of the Respondent's hair samples were then separately tested via GC/MS instrumentation. The test results showed that both samples tested positive for cocaine at a concentration level well above the reporting cut-off level of five nanograms of cocaine per ten milligrams of hair. Sample A tested positive at 21 nanograms of cocaine per ten milligrams of hair and Sample B tested positive at 23.2 nanograms of cocaine per ten milligrams of hair.

Cairns further testified that the GC/MS analytical results show that both of the Respondent's hair samples also tested positive for the presence of benzoylecgonine (BE), the principal cocaine metabolite that is produced in the body when cocaine is ingested and metabolized. Sample A tested positive for BE at 1.4 nanograms of BE per ten milligrams of hair, and Sample B also tested positive for BE at 1.4 nanograms of BE per ten milligrams of hair. Cairns also testified that the Respondent must have consumed cocaine between June 26, 2006 and September 26, 2006, because, based on arm hair growth rates, the Respondent's hair samples reflected cocaine ingestion that occurred six to seven months prior to the date his hairs samples were collected.

On cross-examination, Cairns testified that he is paid an annual salary of \$100,000 by Psychomedics. Cairns was confronted with articles copied from the journal Forensic Science International. One article, "Hair testing for drugs of abuse: evaluation of external cocaine contamination and risk of false positives," authored by Guido Romano, Nunziata Barbera and Isabella Lombardo of the Institute of Legal Medicine, University of Catania, Italy, and published in 2001 (RX E) cites studies and then states that:

These results question the reliability of hair testing. In fact, even using the most sophisticated decontamination procedures it is not possible to distinguish a drug-contaminated subject from an active user. Thus, while a negative result excludes both

chronic use and "contact" with drugs, a positive result cannot and must not be interpreted as a sure sign of drug addiction, but should be further confirmed by urine analysis.

Cairns testified that since this article was published in 2001, decontamination procedures have improved because Psychedics has developed more effective pre-testing mechanical hair wash procedures, as well as a wash criterion to evaluate the effectiveness of the final wash of a hair sample that is about to be tested. Thus, Cairns' asserted that the article's conclusion that "even using the most sophisticated decontamination procedures it is not possible to distinguish a drug-contaminated subject from an active user," is not true today. Cairns also testified that urine analysis cannot confirm hair analysis, and vice versa, since urine testing will only detect drug use within three days of the date that the urine was sampled and since hair testing will detect more historical drug use but will not detect drug use within three days of the date that the hair was sampled because three days of hair growth cannot be sampled even by clipping hair close to the scalp.

Cairns was confronted with another article from Forensic Science International entitled: "Distinguishing passive contamination from active cocaine consumption: assessing the occupational exposure of narcotics officers to cocaine," by Professor Tom Mieczkowski, Department of Criminology, University of South Florida (RX B). In this article, Mieczkowski states:

The problem of passive, inadvertent ingestion is one which presents a somewhat different interpretive issue. Because passive ingestion can produce the same qualitative biological outcome and same metabolic outcomes as "knowing use" one must take the same approach as has been done with urinalysis. This requires an operational assumption that casual, inadvertent "use" (i.e. ingestion) normally differs substantially in quantitative dimensions from active use. This is essentially a statistical distinction. Inadvertent users and deliberate users have the same experience, in a qualitative biological sense. However, they do not have the same experience in a quantitative sense. Inadvertent use (except under the most bizarre circumstances) is an event premised on minor exposure,

while willful use is an event which typically is characterized by large-scale consumption, especially for cocaine abusers.

Discussing "the use of threshold criteria," Mieczkowski states:

When it is necessary to control for passive ingestion of cocaine (e.g. by passive inhalation of crack smoke, by contamination due to exchange of body fluids such as semen or sweat), hair analysis uses the same methodology as urinalysis, statistically based cut-off values. The value of the assay must exceed a specific threshold in order to be labeled as a diagnostic positive outcome. This is quite distinct from a technical positive. That is, the specimen has a technically detectable amount of the particular analyte present, but an insufficient amount of the drug is recovered to "cross" the cutoff threshold. Where should such a threshold be established? Unless one decides that the LOD (limit of detection) is appropriate, there is no technically imposed answer to this question. The threshold represents a marker at which it is generally recognized that explanations of passive or inadvertent exposure are implausible. This is intrinsically a statistical phenomenon and is related to the scatter caused by biochemical clinical individuality and the correlation between dosage and cocaine levels in hair. Unlike urine, the statistics of hair analysis are not effected by excretion kinetics. Kintz and Mangin have addressed this issue and recommend a "stand alone" value for cocaine of 1 ng/mg of hair (i.e. by "stand alone" is meant that hair is used in the absence of any other corroborating specimen), and suggest that this cut-off may be lowered to 0.5 ng/mg when "supported by other evidence of drug intake." Baumgartner and Hill have argued for the use of a 0.5ng/mg cut-off value.

Mieczkowski further states that:

It may also be possible that with chronic, intimate skin-to-skin contact, augmented by exchange of body fluids through sexual activity that an "innocent" person becomes contaminated via contact and ingestion and could attain sufficient concentration in the hair to cross the lowest threshold as an evidentiary positive. Persons (such as undercover narcotics officers) who are peripheral but chronically "dabble" with cocaine may be detected as positive at low values. This may also be true for persons who sell or package cocaine, but do not regularly or recreationally use the drug in any active manner. However, there is little in the way of data to support this as a commonplace event, and considerable data to support the view that such events are rare. It seems implausible that such persons could attain the values we consistently find in active cocaine users.

Cairns testified that Mieczkowski is a trained statistician but not a forensic toxicologist. With regard to "the use of threshold criteria," Cairns testified that technically a laboratory can properly report a positive result for the presence of cocaine in a hair sample if any amount of cocaine is detected in the sample by the instrumentation

used in the GC/MS test, and that establishing a reporting cut-off value at a level above the actual detection level is a safety measure to control for those situations where a trace amount of cocaine caused by passive ingestion might be detected in a hair sample. Cairns testified that Psychemedics uses the standard cut-off level of five nanograms to avoid reporting false positive results. Cairns further testified that the U.S. Food and Drug Administration has promulgated a proposed regulation recommending that all federal agencies adopt five nanograms of cocaine per ten milligrams of hair as the cut-off level for determining if a hair testing result should be reported positive for the presence of cocaine.

Cairns further testified that he agreed with Mieczkowski's statement that "it may also be possible that with chronic, intimate skin-to-skin contact, augmented by exchange of body fluids through sexual activity that an 'innocent' person becomes contaminated via contact," but Cairns stressed that Mieczkowski raised only the possibility of such contamination and that his use of the word possibility connotes speculation. Cairns also stressed that Mieczkowski conceded in his article that "there is little in the way of data to support this as a commonplace event, and considerable data to support the view that such events are rare" and that "it seems implausible that such persons could attain the values we consistently find in active cocaine users."

Cairns was also confronted with testimony on "Federal Workplace Drug-Testing" that was offered by Dr. Edward J. Cone, National Institute on Drug Abuse, National Institutes of Health, U.S. Department of Health and Human Services, at a hearing before the House Committee on Commerce, Subcommittee on Oversight and Investigations on July 23, 1998 (RX D). Cone stated at this hearing:

While the technology of hair testing has progressed rapidly, there remain several highly controversial aspects of hair testing yet to be worked out. First and probably foremost, it is unclear how drugs enter hair. The most likely routes involve: diffusion from blood into the hair follicle and hair cells with subsequent binding to hair cell components, excretion in sweat which bathes hair follicles and hair strands, excretion of oily secretions into the hair follicle and onto the skin surface, entry from the environment. The possibility of drug entry from sweat and/or the environment are particularly troubling since this allows the possibility of false positives if an individual's hair absorbs drugs from the environment or from another person's drug laden sweat.

Cairns testified that Cone reached this conclusion because the hair wash procedure used by Cone in 1998 was inadequate to remove external contamination from hair. Cairns reiterated that during the decade that has passed since Cone made this statement, Psychemedics has developed effective pre-testing mechanical hair wash procedures and a wash criterion regarding the final wash of a hair sample that is about to be tested. Cairns testified that because of these wash procedures and wash criterion, "all concerns have now been resolved" regarding hair samples testing positive for cocaine as a result of external contamination. Cairns testified that as a result, when Psychemedics' pre-testing hair wash procedures and criterion are used, all external contamination is eliminated and "you get no false positives as a result of external contamination."

On recall testimony after the Respondent's testimony, Cairns testified that the involuntary ingestion explanation offered by the Respondent does not account for how his hair samples tested positive for cocaine at the level detected in each of the two samples which constituted a concentration level four times above the reporting cut-off level. Cairns further testified that ingestion of McCarthy's sweat and vaginal secretions would not have produced the cocaine levels detected in the Respondent's hair samples because when cocaine is suspended within a fluid that has been ingested, most of it is

quickly flushed out of the body through urination and “very, very little makes its way into either the sweat or the discharge from the vagina.”

Cairns opined that the cocaine concentration levels detected in the two hair samples precluded the possibility that the Respondent’s hair samples could have been contaminated with cocaine solely as a result of physical contact McCarthy and her body fluids. Cairns opined that the Respondent would have had to ingest “several liters” of McCarthy’s bodily fluids every time they had sex to cause his hair samples to test positive for cocaine. Cairns also testified that ingesting one “line” of cocaine containing approximately 100 milligrams of cocaine is “insufficient to get you anywhere near cutoff” level, and that because “multiple ingestions over six months” consisting of up to “12 ingestion periods” would only “get up to an amount that would just get you over cutoff” level, the test results “indicate multiple use of cocaine” by the Respondent between June 26, 2006 and September 26, 2006, in excess of 12 ingestion periods.

The Respondent’s Case

Retired Sergeant Timothy Sikorski, Lieutenant Joseph Grogan, Keith Gates, Detroit Police Department Inspector Nick Kyriacou, Coreen McCarthy, Dr. Stephen Dresnick, Dr. Charles Jin and Kenneth Solosky were called as witnesses, and the Respondent testified in his own behalf.

Retired Sergeant Timothy Sikorski

Sergeant Sikorski, who retired from the Department in 2005 in the rank of sergeant after serving for 23 years, testified that he presently works in the security

department at [REDACTED] Sikorski testified that he supervised the Respondent for five years at the 6 Precinct from 1994 until 1999.

Sikorski recalled that the Respondent had a "pristine" reputation for honesty and integrity. He recalled that the 6 Precinct business community gave the Respondent an award for outstanding police performance. On occasion, Sikorski socialized with the Respondent and he recalled that the Respondent never drank alcohol. Sikorski provided a recommendation for the Respondent when he sought to be transferred into the Aviation Unit.

On cross-examination, Sikorski conceded that he did not directly supervise the Respondent after 1999. Sikorski testified that he never accompanied the Respondent to any rock or punk rock clubs.

Lieutenant Joseph Grogan

Lieutenant Grogan, who is assigned to Patrol Borough Manhattan South, testified that he was the Respondent's day tour platoon commander at the 6 Precinct before the Respondent was transferred to the Aviation Unit. Grogan recalled that the Respondent "extended" himself by volunteering to help with desk duties and errands. Grogan testified that he occasionally socialized with the Respondent after work and that he never saw the Respondent drink alcohol. He recalled that the Respondent's passions were being a police officer and helicopters.

On cross-examination, Grogan testified that he never went to a rock club with the Respondent. He recalled that he met Coreen McCarthy once during 2005 when he visited the Respondent's apartment.

Keith Gates

Gates, who is employed as a biological researcher at the biology lab at the State University of New York at Stony Brook, testified that he and the Respondent have been friends since 1983. Prior to 1989, Gates accompanied the Respondent to "punk rock" shows. Gates testified that the Respondent was considered "straight edge" meaning that he did not use any drugs.

On cross-examination, Gates testified that after 1989, he and the Respondent would occasionally go out to dinner together. Gates testified that he met McCarthy for the first time when he appeared to give his testimony in the trial room.

Inspector Nick Kyriacou

Inspector Kyriacou, who has been employed by the City of Detroit Police Department for the past 22 years, testified that he met the Respondent in 1992 and that they have been friends for the past 15 years. He testified that both he and the Respondent collect police memorabilia and that they share an interest in aviation.

He stated that it was his opinion that the Respondent was a person of high integrity and honesty. He has never seen the Respondent drink any alcohol, beer, or wine.

On cross-examination, Kyriacou testified that the last time he visited the Respondent at his residence was three weeks after September 11, 2001. He never met McCarthy prior to his testimony in the trial room. He recalled that in 2004 or 2005, the Respondent came to Detroit and they went out together to a rock club.

Coreen McCarthy

McCarthy, [REDACTED], testified that she is presently employed cleaning apartments. She testified that she attended college [REDACTED] and that she met the Respondent during the mid-1990s at punk rock concerts. She testified that they began dating about two years ago. During 2006, McCarthy worked Thursday through Saturday from 7:00 p.m. to 5:00 a.m. as a security guard and cocktail waitress at a bar in Manhattan. She testified that there was an apartment above the bar that she was able to use to "crash" when she needed to sleep. After she would get off from work on Sunday morning at 5:00 a.m., she would [REDACTED] to the Respondent's apartment [REDACTED] and she stayed with him until she had to go back to work on Thursday evening.

McCarthy testified that during 2006, she was snorting cocaine every day and "sometimes all night" Thursday through Saturday. She testified that she never brought cocaine into the Respondent's apartment and never used it from Sunday morning through Thursday evening. She hid her cocaine use from the Respondent. When her nose would begin to run, she would tell the Respondent that she was getting a cold or that it was the result of allergies. She testified that the Respondent would not have been able to tell that she was using cocaine because cocaine merely kept her awake and made her more social and talkative. When she was asked whether she exhibited any signs that would have alerted the Respondent that she was using cocaine, she answered, "That's about it."

McCarthy testified that she and the Respondent engaged in mutual oral sex and that while they were engaged in sex she would often be sweating. She recalled that she

would arrive at the Respondent's residence at about 6:00 a.m. on Sunday mornings but that they generally would not have sex until later that evening.

McCarthy testified that on the day when the Respondent's firearms were removed from him in October, 2006, she admitted to the Respondent for the first time that she was using cocaine. She testified that the Respondent became "very angry" at her. She testified that after this, she continued to use cocaine, "in fact more." She testified that she never brought any cocaine into the Respondent's apartment because she was aware that the Respondent would not even allow her to bring alcohol into his residence.

On cross-examination, McCarthy recalled that she would snort cocaine at the clubs she where she worked. McCarthy testified that on the night that she admitted to the Respondent that she had been using cocaine, she stayed over and slept on the couch in the Respondent's apartment. She recalled that she had offered to leave and sleep in Manhattan that night but that the Respondent had told her that she could sleep on the couch.

McCarthy testified that she never sprinkled any cocaine on her or his genital area before or during sex. She testified that between Sundays and Thursdays she used no cocaine at all. After the Respondent was suspended, he informed her that Department investigators were going to interview him and that the investigators might want to interview her also. She testified that after he was suspended, the Respondent did not tell her that he wanted nothing more to do with her and he never told her to get out of his life. McCarthy acknowledged that after the Respondent's suspension, she returned to his apartment to get clothing she left there.

Dr. Stephen Dresnick

Dr. Dresnick, a physician licensed to practice medicine, testified that he interviewed the Respondent and Coreen McCarthy at the office of the Respondent's attorney, Mr. Goldberger. Dr. Dresnick testified that he also read Dr. Charles Jin's behavioral assessment of the Respondent.

Dr. Dresnick recalled that McCarthy told him that she had ingested cocaine while she was on a train traveling to the Respondent's residence. They both told him that they had engaged in frequent oral and sweaty sex. Dr. Dresnick testified that he believed what the Respondent and McCarthy told him.

Dr. Dresnick testified that he received a report from Toxicology Associates Inc. (RX F). He testified that this report indicated that on January 19, 2007, McCarthy had submitted a vaginal swab containing a specimen of her vaginal secretions. Toxicology Associates analyzed this vaginal secretion specimen. They detected cocaine at a level of 290 nanograms per milliliter when tested by the GC/MS test.

On cross-examination, Dr. Dresnick testified that the specimen analyzed by Toxicology Associates would reflect cocaine ingestion only within the three-day period that preceded the taking of the specimen.

Dr. Dresnick testified that when he receives laboratory results regarding the testing of a specimen submitted by a patient, he only receives a single sheet indicating the results of the testing. He testified that he has never seen a complete laboratory data package. Dr. Dresnick testified that he and the Respondent have a common interest in aviation because they are both helicopter pilots.

Dr. Charles Jin

Dr. Jin testified that he is a psychiatrist affiliated with North Shore Hospital. He testified that he is the author of an article regarding "cocaine use disorders." Dr. Jin recalled that he examined the Respondent in January of 2007 and that he specifically looked to see if the Respondent exhibited any signs of addictive behavior. He testified that this examination lasted "a few hours" and that he then conducted a behavioral assessment of the Respondent. After this examination, he concluded in his behavioral assessment that it was very unlikely that the Respondent had ever used cocaine. Dr. Jin testified that "my specialty is uncovering liars."

On cross-examination, Dr. Jin testified that he never examined or interviewed Coreen McCarthy. He testified that his conclusion that it was very unlikely that the Respondent has ever used cocaine during his life was based solely on his interview of the Respondent because he interviewed no one else. When he was asked whether he could be certain that the Respondent had never used cocaine, he responded that he believed that he could "with reasonable certainty." Dr. Jin testified that even a single use of cocaine by the Respondent would be inconsistent with his life history.

Kenneth Solosky

Solosky, the Chief Pilot for the Newark, New Jersey Police Department's Aviation Unit, testified that he was hired by the New York City Transit Authority Police Department in 1986 and retired as a lieutenant in the New York City Police Department in 2007. He was promoted to lieutenant in 1998 and he was reassigned to the Department's Aviation Unit in March, 1999. He first met the Respondent in 2000 at an

aviation conference and he supervised the Respondent from the time he was assigned to the Department's Aviation Unit in 2004 until October, 2006. He described the Respondent as a hard worker who rarely, if ever, requested sick leave. He has never heard anyone say anything negative about the Respondent with regard to his integrity, his character or his law abidingness.

The Respondent

The Respondent, who obtained a degree in Criminal Justice from the State University of New York at Farmingdale, testified that he is a long-time "punk music" fan and that he has attended "punk music" concerts held in clubs. He recalled that he met McCarthy in August, 2004, at a concert. McCarthy told him that she worked at clubs performing door security and coat check. He testified that McCarthy knew from the time they met that he was opposed to alcohol and drugs.

During the period from June, 2006 to October 10, 2006, McCarthy would stay with him at his apartment from Sundays through Thursdays. The Respondent testified that they often engaged in sweaty sex which included mutual oral sex. He testified that the entire time they were together, McCarthy never exhibited any drug use symptoms with the exception of an occasional runny nose. He accepted McCarthy's explanations that her nose was running as a result of allergies or a head cold. The Respondent testified that he has never been trained how to recognize a drug user. He recalled that when he was notified that he had failed his Dole test and had tested positive for cocaine he initially thought it was a joke because he has never used any drug. He testified that after he told McCarthy that he had failed his drug test and that he had tested positive for cocaine, he

asked her whether she had used cocaine. He noticed that McCarthy "had a funny look on her face." She then confessed to using cocaine several times a week while they were living together but that she had never used it inside his residence. He recalled that he told McCarthy, "You know we're done, right?" McCarthy responded, "I know." The Respondent testified that after he was suspended, he allowed McCarthy to continue to store some of her clothing at his residence for a short period of time.

On cross-examination, the Respondent acknowledged that his attorney had arranged for him to undergo two separate, independent tests of his hair at a physician's office and that both of these hair samples had tested positive for cocaine. The Respondent testified that he had no knowledge of any drug use occurring at any of the clubs he frequented. The Respondent testified that on the day he was informed that he had tested positive for cocaine and McCarthy admitted to him that she was using cocaine, he told her that she could not stay at his residence anymore. However, because it was after midnight, he allowed McCarthy to sleep on his couch that night. He acknowledged that he did not search his house to be certain that McCarthy was not lying to him when she told him that she had never brought any cocaine into the residence.

The Respondent was confronted with a statement he made in his official Department interview. When the Respondent was asked whether any of McCarthy's friends used drugs, he answered, "I think they may have been smoking pot." The Respondent testified that he never noticed any irritability in McCarthy's demeanor. He recalled that Grogan had met McCarthy. The Respondent acknowledged that he did not cut all ties to McCarthy after he was suspended.

FINDINGS AND ANALYSIS

Random drug screening selection and hair sample collection and testing procedures

The Respondent does not challenge the computer software program that generated his name on a list of members who were to be ordered to report to the Medical Division for random drug screening. This computer program has been found to satisfy the requirement of randomness sufficient to justify a drug testing order.¹ The Respondent also does not contest that his arm hair samples were properly collected, packaged, sealed and transported to Psychomedics for testing. Neither does the Respondent challenge the accuracy of the results produced by the screening test that is utilized by Psychomedics to initially analyze hair samples for the presence of cocaine, or the GC/MS instrumentation that is utilized by Psychomedics to confirm the presence of cocaine in samples which have tested positive during the screening test and to quantify the concentration levels in the samples of cocaine and benzoylecgonine (BE), the principal cocaine metabolite that is produced in the body when cocaine is ingested and metabolized.

Cairns, Scientific Director for Psychomedics, was stipulated to be an expert in the field of testing hair for drug content based on the qualifications listed in his curriculum vitae (DX 6). Cairns explained and interpreted the data contained in the laboratory data package produced by Psychomedics which details the analytical results of the testing of the Respondent's hair samples (DX 7). Although Cairns did not personally conduct any of these tests, due process does not require that the technicians who performed these tests testify at the disciplinary hearing because testing results may be admitted and credited based on the testimony of the laboratory director where, as here, the reliability of the

¹ Worrel v. Brown, 177 A.D.2d 446 (1st Dept 1991), leave to appeal denied, 79 N.Y.2d 755 (1992).

testing procedure used has been established, the director is familiar with all the steps taken, the director is subjected to cross-examination and no claim is raised that there was a specific defect in the testing procedures.² The Respondent does not allege any specific defect in the testing procedures utilized by Psychemedics.

Cairns testified that the testing data shows that after one of the Respondent's hair samples tested positive for cocaine via a scientifically recognized screening method, both of the Respondent's hair samples were separately subjected to testing utilizing the scientifically recognized GC/MS method. He explained that the analytical results show that when both of the Respondent's hair samples were individually tested via GC/MS instrumentation, both samples tested positive for cocaine at a concentration level well above cut-off level of five nanograms of cocaine per ten milligrams of hair. Specifically, sample A tested positive at 21 nanograms of cocaine per ten milligrams of hair and Sample B tested positive at 23.2 nanograms of cocaine per ten milligrams of hair. Cairns further testified that the GC/MS analytical results show that both of the Respondent's hair samples tested positive for the presence of BE. Sample A tested positive for BE at 1.4 nanograms of BE per ten milligrams of hair and Sample B also tested positive for BE at 1.4 nanograms of BE per ten milligrams of hair.

Where, as here, a recognized screening test positive result is confirmed when the same sample is subjected to GC/MS analysis, such testing results have been found to constitute substantial scientific evidence of the presence of cocaine.³ Finally, Cairns testimony established that the Respondent consumed cocaine between June 26, 2006 and

² Gordon v. Brown, 84 N.Y.2d 574, 579-580 (1994).

³ McBride v. Kelly, 215 A.D.2d 161 (1st Dept 1995).

September 26, 2006, because, based on arm hair growth rate, the Respondent's samples reflected cocaine ingestion that occurred within the six to seven month period immediately prior to the date his hairs samples were collected.

"Cut-off level" for reporting whether a hair test result is positive for cocaine

Respondent's counsel argued that utilization of a "cut-off level" of five nanograms of cocaine per ten milligrams of hair for the purpose of determining whether a test result should be reported as a positive result is inappropriate. Although Respondent's counsel asserted that this cut-off level was established in a purely "arbitrary" manner and that five nanograms is too "low" to be used as a threshold level, the Respondent presented no expert testimony to support his position.

The only evidence the Respondent proffered to support his assertion was the Mieczkowski article (RX B). I find it significant that Mieczkowski supports Cairns' testimony that from a technical standpoint a laboratory could properly report a positive result for the presence of cocaine in a hair sample if any amount of cocaine is detected in the sample when it is analyzed via the GC/MS test. Mieczkowski also corroborates Cairns' testimony that establishing a reporting "cut-off value" at a level above the actual detection level is designed to control for those situations where a trace amount of cocaine caused by passive ingestion is detected in a hair sample (RXB p. 94). Thus, establishing a reporting cut-off level at any level which is above the actual detection level is designed to protect the individual whose hair has been sampled by avoiding reporting a positive result where a hair sample may have tested positive for cocaine as a result of passive ingestion.

As a result, the selection of any reporting cut-off level which is above that level of cocaine that can actually be detected by the analytical test used is inherently an arbitrary value.

Thus, the only real question presented here is whether Psychemedics' use of a cut-off level of five nanograms of cocaine per ten milligrams of hair to determine whether a test result should be reported to the Department as a positive result is a rationally based cut-off level. I find that Cairns sufficiently established that Psychemedics' use of a cut-off level of five nanograms is a rational cut-off level by pointing out that the U.S. Food and Drug Administration has recommended that all federal agencies adopt five nanograms of cocaine per ten milligrams of hair as the cut-off level for determining whether a hair testing result should be reported positive for the presence of cocaine.

Based on all of the above, the test results obtained by Psychemedics regarding both of the Respondent's hair samples constitute substantial evidence that the Respondent possessed and ingested cocaine between June 26, 2006 and September 26, 2006.⁴

Affirmative defense of involuntary ingestion

The Respondent raised an affirmative defense of involuntary ingestion by contending that his positive test results were the result of exposure to and unknowing ingestion of cocaine during sex with his girlfriend Coreen McCarthy. I reject this affirmative defense because the Respondent established no more than the mere possibility that his positive test results were the result of unknowing ingestion and because the testimony of the Department's expert refuted even the possibility that unknowing

⁴ McGovern v. Safir, 266 A.D.2d 107 (1st Dept 1999).

ingestion could have produced the cocaine levels detected in the Respondent's hair samples. As a result, I find that the Respondent did not meet his burden of persuasion.⁵

It is not disputed that during the period of time relevant to these charges, the Respondent resided with McCarthy who was regularly ingesting cocaine. Thus, if the Respondent chose to use cocaine during this period of time, he had ready access to cocaine through McCarthy. The Respondent's assertion that he has never knowingly ingested cocaine must be examined in light of his patronage of "punk music" clubs, the fact that he met McCarthy when she was working at one of these clubs, and his claim that he never even suspected that McCarthy might be a cocaine user.

Although the Respondent acknowledged that he frequented "punk music" clubs, he and McCarthy asserted that he was known to be someone who never used any drugs. Although the psychiatrist called by the Respondent, Dr. Jin, testified that the Respondent displayed no signs of addictive behavior, Dr. Jin acknowledged that his conclusion that it was very unlikely that the Respondent has ever used cocaine was based solely on a single interview of the Respondent. As a result, I find his testimony has little probative value because it does not conclusively preclude aberrational cocaine use by the Respondent between June 26, 2006 and September 26, 2006.

The Respondent's testimony regarding his total lack of suspicion that McCarthy might be a cocaine user is difficult to credit. He testified that he unquestioningly accepted her bland assurances that her runny nose was the result of a cold or allergies, even though he knew that she worked nights at clubs where it was likely that some of the patrons were cocaine users and even though he admitted at his official Department interview that he suspected that some of McCarthy's friends were using an illegal drug (marijuana).

⁵ Green v. Sielaff, 198 A.D. 2d 113 (1st Dept 1993).

Also, the Respondent's actions regarding McCarthy after he was informed that he was being suspended because he had tested positive for cocaine appear to be inconsistent with his claim that McCarthy had implicitly lied to him by hiding her cocaine use from him. Instead of immediately evicting McCarthy and demanding that she remove all her possessions from his house on the day he was suspended, the Respondent allowed McCarthy to sleep at his apartment that night, he allowed her to store clothing in his apartment after his suspension, and he did not cut all ties to her.

The Respondent's benign post-suspension behavior toward McCarthy is at odds with his testimony that he felt betrayed by her and it is also inconsistent with her testimony that the Respondent was very angry at her after he learned that cocaine had been detected in his hair samples.

The Respondent's involuntary ingestion defense consisted solely of his supposition that he must have ingested cocaine-contaminated fluids through physical contact with McCarthy during sex. Cairns testimony established that Psychemedics' extensive pre-testing sample wash procedures and wash criterion would have eliminated any and all external cocaine contamination of the Respondent's hair samples and McCarthy testified that she never put cocaine in her mouth or in her nose for days prior to having sex with the Respondent and that she has never sprinkled cocaine on her vaginal area. Thus, the involuntary ingestion scenario offered by the Respondent is limited to the Respondent's claim that he ingested McCarthy's sweat during sexual intercourse and her vaginal fluid when he performed oral sex on her.

The Respondent called Dr. Dresnick as a witness. However, I find that his testimony has negligible probative value because he was not qualified as an expert

regarding testing hair for drugs, because his opinions were based on interviews of the Respondent and McCarthy, and because (since he admitted that he has never even seen a laboratory data package) he did not have the expertise to debate, much less refute, Cairn's interpretation of the testing results contained in laboratory data package produced by Psychomedics (DX 7). Also, Dr. Dresnick's testimony regarding the analytical results obtained by Toxicology Associates Inc. when they tested McCarthy's vaginal secretion specimens (RX F) has negligible probative value since he acknowledged that these results reflected only cocaine ingestion by McCarthy during the three day period that preceded the collection of these specimens on January 19, 2007. Thus, these test results do not reflect what amount of cocaine McCarthy was ingesting during the time period relevant to these charges (June 26, 2006 to September 26, 2006).

Thus, I find that the only evidence of value the Respondent offered to support his claim that his hair samples tested positive for cocaine because he ingested McCarthy's cocaine-contaminated fluids was the Mieczkowski article (RX B) and the statement Cone made to Congress (RX D).

Mieczkowski wrote that, "It may also be possible that with chronic, intimate skin-to-skin contact, augmented by exchange of body fluids through sexual activity that an 'innocent' person becomes contaminated via contact and ingestion..." However, Mieczkowski qualifies this possibility by stating that intimate skin-to-skin contact and exchange of body fluids through sexual activity could only "attain sufficient concentration in the hair to cross the lowest threshold as an evidentiary positive." Mieczkowski further qualifies this possibility by stating that, "However, there is little in the way of data to support this as a commonplace event, and considerable data to support

the view that such events are rare. It seems implausible that such persons could attain the values we consistently find in active cocaine users.”

Cone stated that “(t)he possibility of drug entry from sweat and/or the environment are particularly troubling since this allows the possibility of false positives if an individual’s hair absorbs drugs from the environment or from another person’s drug laden sweat.”

Thus, both the Mieczkowski and Cone articles discuss no more than the possibility that exchange of body fluids can result in unknowing ingestion of a detectable amount of cocaine. Since the Respondent established no more than the mere possibility that his positive test results could have been caused by unknowing ingestion, the Respondent did not meet his burden of persuasion.

Moreover, I credit Cairns’ expert testimony that the involuntary ingestion scenario offered by the Respondent does not adequately explain how his hair samples could have tested positive for cocaine at the levels that were detected in the two samples. As noted above, Cairns testified that the analytical results show that when both of the Respondent’s hair samples were separately tested via GC/MS instrumentation, the test results showed that each sample tested positive for cocaine at a concentration level four times above the reporting cut-off level of five nanograms of cocaine per ten milligrams of hair. Cairns offered expert testimony that when cocaine that is suspended within a fluid is ingested, most of the cocaine contained in the fluid is quickly flushed out of the body through urination and that “very, very little makes its way into either the sweat or the discharge from the vagina.”

Thus, Cairns concluded that the cocaine concentration levels detected in the two hair samples precluded any real possibility that the Respondent's hair samples could have been contaminated with cocaine solely as a result of ingesting McCarthy's bodily fluids since, Cairns opined, the Respondent would have had to ingest "several liters" of McCarthy's bodily fluids each and every time they had sex. Also, because a single ingestion of one "line" of cocaine (which contains about 100 milligrams of cocaine) is "insufficient to get you anywhere near cutoff" level, and because "multiple ingestions over six months" consisting of up to "12 ingestion periods" would only "get up to an amount that would just get you over cutoff" level, Cairns testified that the test results "indicate multiple use of cocaine by the Respondent" in excess of 12 ingestion periods between June 26, 2006 and September 26, 2006.

Based on this record, the only conclusion that can be reached is that the Respondent possessed cocaine without police necessity or authority to do so and that he ingested this cocaine by directly snorting, smoking, injecting or swallowing cocaine between June 26, 2006 and September 26, 2006.

The Respondent is found Guilty.

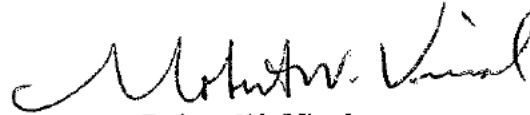
PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Department on April 30, 1991. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has violated the Department's rule against using illegal drugs. Although the Respondent submitted over 80 letters attesting to his good character, I am left with no alternative but to recommend that he be DISMISSED from the New York City Police Department.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner - Trials

APPROVED



APR 9 2018
RAYMOND W. KELLY
POLICE COMMISSIONER